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Attorney for Petitioner

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

STANLEY DEAN DETHMAN,

Petitioner,

vs.

STATE OF MONTANA, THIRD  
JUDICIAL DISTRICT COURT  
AND THE HONORABLE RAY J.  
DAYTON, Presiding Judge,

Respondent.

Cause No.: DA 10-0179

**AMENDED PETITION TO GRANT  
AN OUT-OF-TIME APPEAL**

COMES NOW STANLEY DEAN DETHMAN, hereinafter the  
"Petitioner" and Petitions the Court for an Order Granting an Out-Of-Time  
Appeal, pursuant to Rule 4(6) of the Montana Rules of Appellate Procedure,  
as follows:

**1. Facts Establishing Appropriateness for Out-Of-Time  
Appeal.** Petitioner was deprived of his right to file a timely appeal under  
extraordinary circumstances amounting to a gross miscarriage of justice.

These circumstances constitute more than mere mistake, inadvertence, or excusable neglect.

Petitioner has set forth the facts surrounding the deprivation of his right to a timely appeal in his Affidavit. Petitioner requests the Court to consider the statements made in his Affidavit as if fully set forth herein and the Exhibits to that Affidavit as fully as if attached hereto.

The facts recited and the exhibits presented in the Affidavit filed herewith show that the Petitioner did not have the effective assistance of counsel in filing a timely appeal. In light of Mr. Dethman's schizophrenia, his ability to engage in a reasonable and lucid dialog concerning the decision to represent himself was impaired. He has no training in the law as evident from his misunderstanding of Court procedures and his inability to properly place issues before the Courts with any effectiveness throughout these proceedings, despite his best efforts. Although Mr. Dethman clearly desired an attorney to assist him in filing an appeal and sought the assistance of others in doing so, both his efforts to procure appellate counsel and to file a timely appeal on his own behalf were thwarted by circumstances which were truly beyond his control.

"An out-of-time appeal is a remedy that may be available to a criminal defendant who, through no fault of his own, misses a deadline for filing an

appeal". State v. Tweed, 2002 MT 282, ¶14, 312 Mont. 482, ¶ 14, 59 P.3d 1105, ¶ 14 (citing State v. Garner, 1999 MT 295, ¶ 10, 297 Mont. 89, ¶ 10, 990 P.2d 175, ¶ 10). The cause for the missed appeal deadline in the Tweed decision, like the present case, involved a deprivation of the effective assistance of counsel in securing a timely appeal. In fact, this Court has noted that: "Typically, the missed deadline is due to ineffective assistance of counsel." State v. Garner, Id. (Citing generally State v. Bromgard (1995), 273 Mont. 20, 22, 901 P.2d 611, 613; Hans v. State (1997), 283 Mont. 379, 408-10, 942 P.2d 674, 691-93. Like the defendant in Tweed and the other cases where there was ineffective assistance of counsel, Mr. Dethman is deserving of a remedy through allowance of a late appeal.

## **2. Particular Legal Questions and Issues Anticipated or Expected to be Raised in the Proceeding.**

The primary issue to be raised is whether the Defendant has in fact been disallowed the effective assistance of counsel. This is important not only as an issue determinative of Mr. Dethman's right to an out-of-time appeal, but also as an issue as to whether he was accorded his rights under the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution which guarantee the right to the effective assistance of counsel.

As part of this determination is the question as to whether the District Court made a proper inquiry as to Mr. Dethman's complaints, given Mr. Dethman's psychological condition and his lay misconceptions regarding the legal system. Further, as it seems as though Mr. Dethman was not actually seeking to represent himself, but, rather, was seeking the assistance of some other attorney, there is an issue as to whether the assignment of stand-by counsel was an appropriate remedy under the circumstances.

One additional issue which may be presented on appeal was the permissiveness of allowing at least one witness to refer to the Petitioner as "Sidewinder" before the jury. This is a disrespectful nickname given to Petitioner as a result of an orthopedic problem causing him to list his body to one side.

Several legal issues were suggested by Mr. Dethman which may be further established by the transcript in this matter. As noted in his Affidavit, Mr. Dethman has requested transcripts of the pre-trial and trial proceedings, but has been informed that he will not be able to obtain the transcripts as an indigent until after determination as to whether he will be allowed an out-of-time appeal. Although, Mr. Krakowka stated in his correspondence of April 23, 2009 that appealable issues were "minimal given that you represented

yourself", a review of the transcripts will be necessary for a fair assessment of other matters to be raised on appeal can be made.

### **3. The Arguments and Authorities for Accepting Jurisdiction and Pertaining to the Merits of the Particular Questions and Issues Anticipated or Expected to be Raised.**

The first deprivation of the right to counsel occurred before trial. Prior to trial Mr. Dethman filed complaints with the court concerning what Mr. Dethman believed to be his inadequate representation by Mr. Krakowka.

This court has stated that "When a criminal defendant makes a pretrial request for appointment of substitute counsel in conjunction with allegations of ineffective assistance of counsel, we require the district court to make an adequate inquiry into the nature of the defendant's complaint to determine if those complaints are 'seemingly substantial.'" Halley v. State, 2008 MT 193, ¶ 4, 186 P.3d 859, ¶ 4. (Citing State v. Gallagher, 304 Mont. 215, ¶ 15, 19 P.3d 817, ¶ 15). See, also, State v. Kills On Top, 279 Mont. 384, 928 P.2d 182 (1996); State v. Weaver, 276 Mont 505, 511, 917 P.2d 437, 441 (1996); State v. Finley, 276 Mont. 126, 143, 915 P.2d 208, 218. In such cases "the district court must make an adequate inquiry into the defendant's complaints. Finley, supra 915 P.2d at 219. It is reversible error to fail to

make such a critical inquiry. State v. Enright, 233 Mont. 225, 758 P.2d 779, 782 (1988).

Mr. Dethman's Affidavit indicates that, acting pursuant to State v. Gallagher, 2001 MT 39, ¶ 14, 304 Mont. 215, ¶ 14, 19 P.3d 817, ¶ 14, and the other authorities cited above, Judge Dayton properly scheduled a hearing. However, according to Mr. Dethman's Affidavit, the inquiry at the hearing focused not so much upon Mr. Dethman's wish to have Mr. Krakowa removed from representation, but, rather, whether Mr. Dethman wished to proceed without any counsel and to represent himself. Judge Dayton is reported to have inquired of Dethman: "so Mr. Dethman you are dissatisfied with your attorney. Do you want to proceed to court without counsel?" To this Dethman responded "No, sir." Such a response negates an intention to proceed without counsel.

Every possible presumption against the waiver of counsel is indulged in by courts. Brewer v. Williams, 430 U.S.387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424, 440 (1977). Before a Defendant is granted the right to represent himself a court must determine that a waiver of counsel is unequivocal, as well as voluntary, knowing and intelligent. State v. Langford, 267 Mont. 95, 99, 882 P.2d 490, 492 (1994).

At the Gallagher hearing it was ordered that Mr. Dethman represent himself and that Mr. Krakowka remain as "stand-by" counsel. As it is believed that the record will reflect that Mr. Dethman's position with respect to waiver of counsel and representing himself was not unequivocal, voluntary, knowing and intelligent, it was error to force him to proceed with only "stand by" counsel. Further, in light of Mr. Dethman's schizophrenia, his ability to engage in a reasonable and lucid dialog concerning the decision to represent himself was impaired. What will stand out, however, is a statement by Mr. Dethman that it was not his wish to represent himself.

The second deprivation of the right to the effective assistance of counsel occurred after Mr. Dethman was convicted and engaged in his efforts to obtain counsel for an appeal. These efforts are more fully outlined in Mr. Dethman's Affidavit. It cannot be denied that Mr. Dethman proceeded with due diligence under difficult circumstances. It also cannot be denied that he was operating under conflicting advice from all the parties he sought assistance. His failure to have a timely notice of appeal filed certainly was not attributable to a lack of effort on his part. Rather, it appears to have resulted from a lack of knowledge of procedures, a denial of the assistance of appellate counsel when he sought it, some confusion about the proper procedure for obtaining the services of an appellate public defender and a

failure to refer Mr. Dethman to the office of the public appellate defender or to provide Mr. Dethman with information concerning how to contact the Appellate Public Defender's office.

"Failure to preserve a defendant's right to appeal when the defendant has requested notice be filed is error.... Moreover, when, but for counsel's deficient performance, a defendant would have appealed, such error is prejudicial." State v. Tweed, 2002 MT 282, ¶18, 312 Mont. 482, ¶ 18, 59 P.3d 1105, ¶ 18 (citing State v. Rogers, 2001 MT 165, ¶ 24, 306 Mont. 130, ¶ 24, 32 P.3d 724, ¶ 24 and Roe v. Flores-Ortega, 528 U.S. 470, 477, 122 S.Ct. 1029, 1034-35, 145 L.Ed. 985). Petitioner requested his stand-by counsel for assistance in filing an appeal. He further asked other attorneys within the public defenders office, as well as other persons in Montana government, for assistance. He was not directed to the State Appellate Defenders office until after the time for appeal had lapsed

### **3. Copies of Judgment, Pleadings and Documents Necessary to Make Out a Prima Facie Case or to Substantiate the Petition.**

Copies of the Judgment, Pleadings and Documents Necessary to Make Out a Prima Facie Case or to Substantiate the Petition. These are attached to the Affidavit filed herewith.




**4. Position of Opposing Counsel.** Counsel for Petitioner has contacted Powell County Attorney Louis Smith concerning this Petition and Mr. Smith stated that he opposes the relief requested.

### CONCLUSION

Petitioner hereby respectfully requests that the Court grant this Petition for an Out-of-Time Appeal and reverse and remand this matter to the District Court for such further proceedings as the Court deems proper.

DATED this 12<sup>th</sup> day of April, 2010.


  
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Kevin E. Vainio, Attorney for Petitioner

### VERIFICATION

STANLEY DEAN DETHMAN, being first duly sworn, deposes and says:

1. That he is the Petitioner herein;
2. That he has read the foregoing, knows the contents thereof; and
3. That the matters contained in this Petition are true and correct to the best of his knowledge and belief.

DATED this 12<sup>th</sup> day of APRIL, 2010.

  
\_\_\_\_\_  
Stanley Dean Dethman

Subscribed and sworn to before me this 12<sup>th</sup> day of April, 2010.



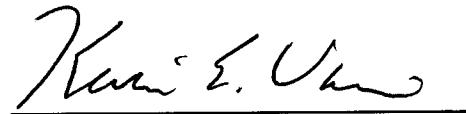
Nysla Humphrey  
Print name: Nysla Humphrey  
Notary Public for the State of Montana  
Residing at Butte, MT  
My Commission expires: Oct. 18, 2010

CERTIFICATE OF SERVICE BY MAIL AND HAND DELIVERY

I, Kevin E. Vainio, attorney for, the Petitioner Stanley Dean Dethman in the above-entitled action, hereby certify that on the 16th day of April, 2010. I served the foregoing by hand delivering a true copy thereof to the office of the Montana Attorney General and by depositing true and correct copies of the foregoing in the U.S.Mail, postage prepaid and addressed as follows:

Lewis K. Smith  
Powell County Attorney  
409 Missouri Avenue  
Deer Lodge, Montana 59722

Honorable Ray J. Dayton  
409 Missouri Avenue  
Deer Lodge, Montana 59722

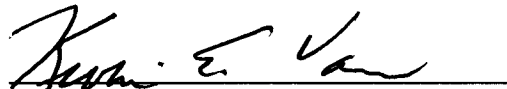
A handwritten signature in cursive script, reading "Kevin E. Vainio", written over a horizontal line.

Kevin E. Vainio  
Attorney for Petitioner

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 27 of the Montana Rules of Appellant Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; word count is 1,937 as calculated by Word 2000 for Windows, and is no more than 12 pages in length, excluding certificate of service and certificate of compliance.

DATED this 16th day of April, 2010.

  
Kevin E. Vainio  
Attorney for Petitioner